Joan Marsh
Director
Federal Government Affairs

Suite 1000
1120 20th Street NW
Washington DC 20036
202 457 3120
FAX 202 457 3110

October 10, 2002

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TWB-204
Washington, DC 20554

Re: Notice of Oral Ex Parte Communication, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket Nos. 01-338, 96-98 and 98-147

Dear Ms. Dortch:

On October 9, 2002, Larry Lafaro, David Carpenter and Richard Rubin, representing AT&T, met with John Rogovin, Nick Bourne, Debra Weiner and Paula Silberthau of the FCC's Office of General Counsel.

At that meeting, the AT&T representatives discussed the implications of the *USTA* decision for the Commission's *Triennial Review* proceeding. In particular, they stated that the extensive record in the *Triennial Review* regarding CLEC impairment in the absence of unbundled network elements ("UNEs") demonstrates that the CLECs' real-world impediments clearly meet the criteria set forth in *USTA*. Specifically, they showed that the CLECs' impairments are rooted in the problems they face when trying to use non-ILEC facilities compete in local services market against the incumbent LECs' ubiquitous networks. Those networks not only have very high fixed costs to duplicate, but CLECs also face significant sunk costs and other traditional entry barriers (both economic and operational) when attempting to replicate the incumbents' facilities to provide their own services.

In support of AT&T's position, the Commission representatives were provided with copies of the same *ex parte* materials that were given to Commission Staff at AT&T's October 3, 2002 meeting in this proceeding and were attached to my October 4, 2002 *ex parte* letter. They stated that any decision the Commission renders regarding the availability of UNEs must reflect the real-world conditions described in that presentation. Moreover, they noted that those materials supported the continued availability of, *inter alia*, high capacity loops and transport to serve the largest business customers and

unbundled local switching and the so-called UNE Platform to serve all mass market customer locations, *i.e.*, customers served by DS0 loops.

In addition, they argued that the Commission cannot justify limiting access to any UNEs based on the availability of non-cost-based special access services. They also pointed out that, unlike the circumstances that existed at the time of the *UNE Remand Order*, it is generally recognized that capital funding for competitive carriers has effectively dried up. Accordingly, the Commission cannot encourage competitors to invest in new facilities by simply removing access to UNEs. Rather, CLEC investment in facilities can only be encouraged by adopting regulatory rules that provide access to UNEs, which will encourage such investment, and by eliminating the "interim" use and commingling restrictions, which prevent economic network builds and thus discourage investment.

With respect to the impacts of intermodal competition, they stated that the limited availability of competition from cable-based telephony does not support any reduction in the availability of UNEs, for several reasons. First, cable competition today is limited in scope. Second, cable facilities are not available for lease by new entrants and thus cannot serve as substitutes for UNEs. Third, as noted by analysts at the recent *en banc* panel held on October 7, cable companies are likely to have limited ability to incur additional debt for at least several years, and when they are again able to return to the capital markets their first priority will be to upgrade their video infrastructure to compete with satellite programmers. Thus, competition from cable telephony will not occur in earnest for many years. Finally, relying only on cable as an alternative to the incumbents' wireline networks at best results in a duopoly, which is inconsistent with the view of competition articulated by the Supreme Court in its recent *Verizon* decision.

Finally, they argued that section 251(d)(3) does not permit the Commission to preempt States from adopting pro-competitive requirements under State law and urged the Commission to seek *certiorari* with respect to the *USTA* decision.

Consistent with Commission rules, I am filing one electronic copy of this notice and request that you place it in the record of the above-referenced proceedings.

Sincerely,

Joan Marsh

cc: John Rogovin; Nick Bourne; Debra Weiner; Paula Silberthau
Thomas Navin; Robert Tanner; Jeremy Miller